ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter of	
Petition For Rulemaking To Determine The Terms And Conditions Under Which Tier I LECs Should Be Permitted To Provide InterLATA Telecommunications Services	RM - 8303

REPLY OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATION RESELLERS ASSOCIATION

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September 17, 1993

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SUMMARY

The Telecommunications Resellers Association supports the Statements filed by the Competitive Telecommunications Association and others in opposition to the captioned Petition for Rulemaking. TRA agrees with these parties that entry by the Regional Bell Operating Companies into the interLATA market cannot be justified until meaningful local exchange/exchange access competition has emerged. As the Commission has recently recognized, the local exchange is "the remaining preserve[] of monopoly telecommunications service." Given the RBOCs' near monopoly control of the local exchange bottleneck, the rulemaking sought here is entirely premature.

The RBOCs have not made the requisite public interest showing in support of their rulemaking request. They have not shown why scarce Commission resources should be dedicated to a proceeding which is facially premature. Nor have they demonstrated that the relief they seek in the proposed rulemaking would be pro-competitive. In light of inherent limitations on regulatory safeguards, the inadequacy of Commission oversight and enforcement resources and persistent historical patterns of anticompetitive abuse by the RBOCs, there is a strong likelihood that the RBOCs would use their control of local exchange bottlenecks to disadvantage competing interexchange carriers and otherwise impede competition in the interLATA market.

In the event, however, that the Commission feels constrained to move forward on the RBOC rulemaking request, TRA suggests that a notice of inquiry would be the most appropriate vehicle to ensure broad industry participation and the development of a full and complete record.

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REPLY OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), by its attorneys and pursuant to Section 1.405 of the Commission's Rules, 47 C.F.R. §1.405, hereby submits its Reply to Statements supporting and opposing the captioned Petition for Rulemaking (the "Petition") filed by Bell Atlantic Corporation ("Bell Atlantic"), BellSouth Corporation ("BellSouth"), NYNEX Corporation ("NYNEX"), Pacific Telesis Group ("PacTel") and Southwestern Bell Corporation ("Southwestern Bell") (collectively the "RBOCs"). TRA supports the Statements filed by the Competitive Telecommunications Association ("CompTel") and others in opposition to the RBOC's rulemaking request. TRA agrees with these parties that the rulemaking sought by the RBOCs would be premature and that the RBOCs have wholly failed to demonstrate that either the initiation of the proposed proceeding or the grant of the ultimate relief sought therein would be in the public interest.

I.

INTRODUCTION

TRA is an association created to foster and promote the interests of entities engaged in the business of reselling or otherwise providing long distance telephone services both within the United States and internationally. It was chartered, among other things, to represent the views of its members before the Commission, other federal and state regulatory agencies and departments, legislative bodies and federal and state courts. Formed by the merger of the Telecommunications Marketing Association and the Interexchange Resellers Association in late 1992, TRA's membership currently exceeds 130 resale carriers and their service and product suppliers.

TRA strongly believes that competition in the provision of telecommunications products and services should be fostered wherever and whenever possible. TRA is well aware that the emergence, growth and development of a vibrant telecommunications resale industry is, and continues to be, a direct product of a services of pro-competitive initiatives undertaken and policies adopted by the Commission over the past decade. All things being equal, market forces are, in TRA's view, generally superior to regulation in promoting the efficient provision of diverse and affordable telecommunications products and services.

Market forces, however, are effective regulators only if all market participants are afforded a full and fair opportunity to compete. If the playing field is not level, competition cannot flourish. Regulatory intervention is critical if one or more players

are possessed of market power sufficient to hinder or otherwise impede competition. As TRA will suggest below, the RBOCs would have both the incentive, and, by virtue of their near monopoly control of local exchange bottlenecks, the ability, to disadvantage other interexchange carriers through anticompetitive conduct if permitted to enter the interLATA market. Moreover, TRA believes that until such time as meaningful local exchange/ exchange access competition emerges, no regulatory safeguards -- no matter how well conceived or intentioned -- could or would prevent RBOC abuse of such market power.

II.

ARGUMENT

A. The Rulemaking Requested By The RBOCs Would Be Premature In Light Of The RBOCs' Near Monopoly Control Of Local Exchange Bottlenecks

TRA endorses the comments of those parties who persuasively argue that the rulemaking sought by the RBOCs would be premature in light of the RBOCs' near monopoly control of local exchange bottlenecks.[1/] As noted above, TRA does not believe that RBOC entry into the interLATA market can be justified until meaningful local exchange/exchange access competition has emerged. And despite the protestations of the RBOCs to the contrary, the local exchange remains a monopoly enclave of the RBOCs.

[1/] See, e.g., Comments of CompTel, Allnet Communications Services, Inc. ("Allnet"), LDDS Communications, Inc. ("LDDS") and Capital Network System, Inc. ("CNS"). Section 1.401(e) of the Commission's rules authorizes the Commission to dismiss or deny petitions for rulemaking which are " moot, premature, repetitive, frivolous or which plainly do not warrant consideration by the Commission." 47 C.F.R. §1.401(e).

Within the last year, the Commission correctly characterized the local exchange as "the remaining preserve[] of monopoly telecommunications service."[2/] More recently, the Commission, in structuring the switched transport interconnection charge, recognized the RBOC's continued incentives to "impede local access competition."[3/] Earlier, the Commission had noted the lack of "meaningful competition in LEC markets"[4/] and had found that competitive access providers ("CAPs") had not made significant competitive inroads in even the most arguably contested markets.[5/]

In streamlining regulation of AT&T, the Commission noted that several market characteristics were critical to a finding that substantial competition exists in a given market.[6/] These factors include high demand and supply elasticities, a less than overwhelming market share and pricing below authorized ceilings.[7/] Unlike the interexchange market, the local exchange is not populated by

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[2/] Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369, ¶ 1 (1992), pets. for review pending sub nom. Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C.Cir. filed Nov. 25, 1992), recon. 8 FCC Rcd. 127 (1992), further recon. FCC 93-378, FCC 93-379 (Sept. 2, 1993).

[3/] Transport Rate Structure and Pricing, 8 FCC Rcd. 5370, ¶¶ 25, 51 (1993).

[4/] Policy and Rules Concerning Dominant Carriers, 5 FCC Rcd. 2176, ¶ 108 (1990); Policy and Rules Concerning Dominant Carriers, 4 FCC Rcd. 2873, ¶¶ 572-78 (1989).

[5/] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, 4 FCC Rcd. 8634, ¶¶ 52-55, 75, 84 (1989), recon. 5 FCC Rcd. 4842 (1990).

[6/] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, ¶¶ 36-51 (1991), recon. 6 FCC Rcd. 7569 (1991), further recon. 7 FCC Rcd. 2677 (1992), recon pending.

[7/] Id.

"existing competitors [that] have or can relatively easily acquire significant additional capacity . . . {or} new suppliers [that] can enter the market relatively easily and add to existing capacity."[8/] Nor are the market shares of the RBOCs at "a level that is not incompatible with a highly competitive market" -- i.e., fifty percent.[9/] And the RBOCs certainly do not voluntarily price below authorized ceilings. Indeed, during this summer alone, the Commission has been compelled to reject or suspend, investigate and subject to accounting orders the 1993 annual access,[10/] line information database,[11/] 800 database[12/] and expanded interconnection tariffs of many of the RBOCs due, among other things, to the inclusion therein of excessive charges.[13/]

The Commission's assessment of the state of local exchange/exchange access competition are, of course, borne out by available data. Judge Greene's finding in 1987 that "99.9 percent of all interexchange traffic, generated by 99.9999 percent of the nation's telephone customers is today carried entirely or in some

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[8/] Id. at ¶ 43.

[9/] Id. at ¶ 51.

[10/] 1993 Annual Access Tariff Filings, 8 FCC Rcd. 4960 (1993).

[11/] Local Exchange Carrier Line Information Database, CC Docket No. 92-24, FCC 93-400 (August 23, 1993).

[12/] 800 Data Base Access Tariffs and the 800 Service Management System Tariff, 8 FCC Rcd. 5132 (1993).

[13/] Special Access Expanded Interconnection Tariffs, 8 FCC Rcd. 4589 (1993).

part by the Regional Companies" remains essentially true today.[14/] The Commission's fiber deployment analyses continue to show CAP fiber deployment as but a small fraction of the fiber deployed by the RBOCs -- 2.6 percent.[15/] CAP revenues constitute an even smaller percentage of RBOC revenues -- significantly less than one percent.[16/] And CompTel confirms that of AT&T's $14 billion in access expenditures, local exchange carriers receive 98.86 percent.[17/] For the most part, CAPS continue to serve geographically-limited niche markets, selectively impacting only the growth of RBOC demand.[18/]

While wireless services may someday provide a meaningful alternative to the local exchange network, that day has not yet arrived and will likely not arrive, if at all, for years to come. Cellular service supplements rather than replaces wired service; indeed, the overwhelming majority of cellular calls are carried at one time or another by the local exchange network. Growth in cellular demand has been impressive, but it has not adversely affected the profitability of the RBOCs' local exchange operations. Cellular demand growth notwithstanding, the RBOCs have continued to earn rates of return at or above authorized levels. In the three

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[14/] United States v. Western Electric Co., 673 F. Supp 525, 540 (D.C. Cir. 1987), aff'd in part, rev'd in part, 900 F2d. 283 (D.C. Cir. 1990).

[15/] Kraushaar, J. M., Fiber Deployment Update: End of Year 1992 (April 1993).

[16/] Opposition of Allnet at Att. I, p. 7.

[17/] Comments of CompTel at 13.

[18/] Kraushaar, J. M., Fiber Deployment Update: End of Year 1989 (Feb. 28, 1990).

years immediately preceding the adoption of price caps, for example, four of the seven RBOCs consistently earned returns in excess of authorized levels, while two others did so in two of the three years.[19/] Under incentive regulation, this trend has continued; indeed, a number of the RBOCs have earned returns sufficiently high to require earnings sharing under the price caps sharing mechanism.[20/] Moreover, it must be borne in mind that the RBOCs and GTE Telephone represent eight of the nine largest cellular operators in the country.

Personal communications service ("PCS") may someday fulfill the vision of its most ardent proponents and render the wireline network superfluous, but at this juncture any claims regarding the potential competitive impact of PCS on the local exchange are grossly speculative. The rules and policies governing spectrum allocation and system licensing have yet to be finalized; system construction and service implementation may be years away. Reliance upon the potential competitive threat of cable television is no less speculative. If cable companies enter the local exchange market and prove themselves to be viable and effective competitors, the concerns raised here by the RBOCs should be given serious consideration. Simply asserting, however, that cable companies are "poised to offer house-to-house and business-to-business phone service in direct

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[19/] See generally Tariff Review Plans and Descriptions and Justifications filed by the RBOCs with their respective annual access tariff filings in 1988, 1989 and 1990.

[20/] See e.g., 1992 Annual Access Tariff Filings, 7 FCC Rcd. 4731 (1992).

competition with local telephone companies" (Petition at 24) doesn't make it so.

As they have repeatedly done over the past decade, the RBOCs continue to equate potential competition with actual competition and the presence of competitors with the existence of meaningful competition. It belabors the obvious to suggest that merely because competition may someday emerge or because one or more barriers to entry have been removed, regulators should act as if the market is contested. It is no less obvious that the mere presence of one or more competitors does not make a market competitive or justify treating it as such.

The Commission has launched a number of initiatives over the past two years that are intended to foster a more competitive local exchange/exchange access environment. The Expanded Interconnection, Switched Transport and Intelligent Network proceedings are all "steps in the process of opening the remaining preserves of monopoly telecommunications service to competition."[21/] But they are but a few steps in what will likely be a long trek. As the Commission has recognized, for example, special access and interstate switched transport represent only "a fraction of the total access revenues that the LECs receive."[22/]

21/ Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369 at ¶ 1. It bears emphasis that the RBOCs have strongly resisted all of these incremental, pro-competitive steps and are currently appealing the Commission's directive that they allow CAPS to terminate and collocate transmission facilities in RBOC central offices.

22/ Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase I, FCC 93-379, ¶ 15 (Sept. 2, 1993).

TRA applauds the Commission's efforts to facilitate the emergence of local exchange/exchange access competition. It strongly encourages the Commission not only to give its existing pro-competitive initiatives time to accomplish their limited ends, but to continue to seek other means to further open the local exchange to competition. And if it is successful in these efforts and local exchange/exchange access competition does flourish, the Commission should at that time reexamine its regulation of the RBOCs. But it should not be pushed into premature actions on the basis of what might someday be.[23/]

B. The RBOCs Have Not Shown That The Rulemaking They Have Requested Or The Relief They Seek Therein Would Be In the Public Interest

The Commission should initiate a rulemaking only if its determines that such a proceeding would further a clear public interest objective. It is thus incumbent upon the petitioning party to make such a public interest showing both with respect to the proceeding itself and the relief sought therein. Here the RBOCs must

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[23/] Lest there be any confusion, the United States Court of Appeals for the District of Columbia Circuit did not, as the RBOCs have suggested, invite the Commission "to retake the policy initiative in this area by setting the express terms and conditions under which BOC entry into interLATA service is to be accomplished." Petition at 8. Rather the Court held in the portion of its decision upon which the RBOCs rely to support their claim that "the BOCs failed to show that there was no substantial possibility that they could use their monopoly power to impede competition in the interexchange market." This holding was based on the Department of Justice's assessment not only that FCC regulations were not designed to cope with RBOC entry into the interexchange market, but the Department's view that "violations of the equal access policy are extremely difficult to detect" and that "the BOCs will have an easier time acquiring market power in the interexchange market than in other markets." United States v. Western Elec. Co., 900 F.2d 283, 301 (1990).

demonstrate why the Commission should allocate scarce resources to a proceeding which is facially premature.[24/] The RBOCs must further demonstrate why their entry into the interLATA market at this time is publicly beneficial. TRA submits that the RBOCs have not made, and could not make, either showing.

First, in light of their near monopoly control of the local exchange bottleneck, RBOC entry into the interexchange market would likely impede rather than foster competition. Given that virtually all interexchange traffic originates and/or terminates in a local exchange and that exchange access costs constitute nearly fifty percent of the costs of providing interLATA services, bottleneck control would provide the RBOCs with an arsenal of anticompetitive tools with which to disadvantage competing interexchange carriers. If historical patterns of behavior persist, the RBOCs, absent effective regulatory safeguards, will use their monopoly position to discriminate against competitors in the provision and pricing of exchange access, to cross-subsidize their interexchange activities with local exchange monopoly profits and to otherwise dampen competition. The various means of achieving these anticompetitive ends are well documented and need not be repeated here. Nor is it necessary to provide a litany of past RBOC misconduct; these too are

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[24/] As noted above, TRA believes that any consideration of RBOC entry into the interLATA market is premature in the absence of meaningful local exchange/exchange access competition. The requested rulemaking is also premature given that Congress has before it proposals to modify the line of business restrictions and the terms to be associated with any such relief. The rulemaking the RBOCs have proposed might well prove to be a meaningless exercise if Congress were to move in a direction other than that taken by the FCC.

well documented.[25/] The sole question that need be answered here is whether or not regulatory safeguards can effectively prevent such abuses.

TRA submits that no matter how well conceived or intentioned, regulation will prove inadequate to effectively police RBOC conduct if entry into the interLATA market is sanctioned. First, the Commission simply will not have the resources to effectively enforce whatever regulations it adopts. For example, in a recent study of FCC auditing capabilities, the General Accounting Office ("GAO") reported that the staff resources it had found inadequate six years earlier had declined while the agency's responsibilities for overseeing carriers' cost allocations had grown. Based on this finding, GAO concluded that "the number of FCC auditors remains inadequate to provide a positive assurance that ratepayers are protected from cross-subsidization.[26/] Chairman Quello was even more frank in his assessment:

> During the last dozen years the FCC has seen its ability to function effectively stretched to the breaking point by budget constraints.[27/]
>
> I cannot say more plainly that this is an agency already stretched to and in many places beyond, its capacity.[28/]

[25/] See, e.g., LDDS Comments at Att. A.

[26/] General Accounting Office, FCC Oversight Efforts to Control Cross-Subsidization, GAO/RCED-93-34 (Feb. 1993).

[27/] Statement of James H. Quello, FCC Chairman, Before the Subcommittee on Commerce, Justice, State and Judiciary, Committee on Appropriations, United States House of Representatives, March 25, 1993 at 2.

[28/] Statement of James H. Quello, FCC Chairman, Before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, United States House of Representatives, June 17, 1993 at 16.

> [W]e lack enough auditors to do as much common carrier auditing as we are expected to do.[29/]

Indeed, the GAO estimates that the FCC would only be able to conduct audits of the highest priority matters once every eleven years and would only be able to undertake a full audit of major LECs once every eighteen years.[30/]

Most regulations are not self-enforcing; they require vigilant oversight. As the Department of Justice has recognized, "violations of the equal access policy are extremely difficult to detect and remedy."[31/] The Department long ago also recognized the limitations of even the most dramatic safeguard -- structural separation:

> [A] separate subsidiary requirement . . . cannot effectively foreclose all of the ways in which the BOCs could discriminate in favor of a separate affiliate providing competitive products and services . . . [or guard against] the danger of cross-subsidization which would arise from any permitted joint use of assets, facilities or personnel between the BOCs and any separate affiliates . . .[32/]

The RBOCs nonetheless have already begun arguing that nonstructural safeguards should be substituted for structural separation and that they should be classified as nondominant carriers in the interLATA market. Petition at 32-40.

[29/] Id. at 6 & 8.

[30/] General Accounting Office, FCC Oversight Efforts to Control Cross-Subsidization at 2.

[31/] United States v. Western Elec. Co., 900 F.2d 283, 301 (1990).

[32/] Response of the United States to Public Comments on Proposed Modification of Final Judgement, 47 Fed. Reg. 23320, 23336-37 (May 27, 1982).

Absent vigilant enforcement, regulatory effectiveness depends on good faith compliance by regulated entities. As the report prepared by the Unity Coalition and submitted here by LDDS confirms, past RBOC behavior does not auger well for future compliance.[33/] In its thirty-page report, the Unity Coalition outlines a persistent pattern of RBOC abuse over the past decade. There is no reason to believe that such behavioral patterns would not continue following RBOC entry into the interLATA market.

The threat that RBOC entry into the interLATA market would dampen rather than enhance competition thus looms large. The RBOCs argue, however, that their market participation is necessary to enliven an oligopolistic market dominated by a single carrier. Petition at 10-14. Putting aside for a moment TRA's views, the Commission found the business services component of that same market to be "substantially competitive" two years ago[34/] and recently concluded that "AT&T's 800 services are now subject to substantial competition."[35/] Notwithstanding these findings, TRA does not disagree with the RBOCs that AT&T remains the dominant carrier in the marketplace and that the interLATA market is not fully competitive. The interLATA market, however, is far more competitive today than even a few years ago and competition continues to increase

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[33/] Unity Coalition, "Anticompetitive and Anticonsumer Practices of the Regional Bell Operating Companies since the Break-up of the Bell System" (Attached to LDDS Comments at Attachment A).

[34/] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880 at ¶ 36.

[35/] Competition in the Interstate Interexchange Marketplace, 8 FCC Rcd. 3668, ¶ 10 (1993).

incrementally. In TRA's view, RBOC market entry is thus unnecessary and, more critically, is more apt to reverse these pro-competitive trends than to enhance them.

Finally, the Commission's resources today are precious. To paraphrase Chairman Quello, the FCC is stretched to the breaking point. The Commission currently has on its plate not only the various pro-competitive initiatives discussed herein, but such monumental undertakings as the implementation of the recent cable television legislation and the introduction of personal communications services, among others. The rulemaking the RBOCs have proposed here would not only be highly complex and of considerable breadth, but highly contentious. It simply makes no sense to dedicate the massive resources such a proceeding would require to a matter not yet ripe for resolution.

C. If the Commission Feels Compelled to Initiate Action, A Notice of Inquiry Would Be a Superior Vehicle

If the Commission feels itself constrained to move forward on the RBOC request, TRA recommends that rather than commence a rulemaking proceeding, the Commission should issue a notice of inquiry. Given the importance and the complexity of the issues potential RBOC entry into the interLATA market would raise, a substantial record will be needed to reach tentative conclusions and draft proposed rules. Widespread industry participation in the development of such a record would be critical. A notice of inquiry would avoid an unfortunate rush to judgement by ensuring that

whatever rules are ultimately proposed are premised on complete and detailed evidence.

III.

CONCLUSION

By reason of the foregoing, TRA strongly urges the Commission, consistent with the oppositions of CompTel and others who have argued vehemently against the rulemaking the RBOCs have requested, to deny the RBOC Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Shiona Baum, hereby certify that on this 17th day of September, 1993, copies of the foregoing document were sent by first class mail, postage prepaid, to the parties on the attached list.

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